93-25

U.S.
FILED
JUN 29 1993
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NO. _____

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IN THE
Supreme Court Of The United States
OCTOBER TERM 1992

KENNETH STRAIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DeGUERIN & DICKSON

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QUESTION PRESENTED

WHETHER A TRIAL COURT CAN DETERMINE A DEFENDANT'S BASE OFFENSE LEVEL USING AN AMOUNT OF MARIJUANA THAT THE DEFENDANT EXPRESSLY STATED HE DID NOT WANT TO PURCHASE, NEVER INTENDED TO PURCHASE, AND NEVER AGREED TO PURCHASE WITH ANYONE ELSE.

LIST OF PARTIES

1. Kenneth Strain
   Petitioner

2. David Curtis Hoot
   Co-Defendant

3. Joseph Darold Rambo
   Co-Defendant

4. Dick DeGuerin
   Attorney for Petitioner Kenneth Strain

5. Chris Flood
   Attorney for Petitioner Kenneth Strain

6. Robert J. Kuhn
   Attorney for Co-Defendant Hoot

7. Bruce S. Fox
   Attorney for Co-Defendant Joseph Rambo

8. United States of America
   James Hensarling
   Assistant United States Attorney

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KENNETH STRAIN,
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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

Petitioner Kenneth Strain, praying that Writ of Certiorari be issued to review the judgment and opinion in the United States Court of Appeals for the Fifth Circuit issued on March 4, 1993, files this Petition for Writ of Certiorari, saying more particularly in support:

OPINIONS AND JUDGMENTS ISSUED IN THE COURTS BELOW

On March 4, 1993, the United States Court of Appeals for the Fifth Circuit rendered its Opinion affirming the judgment and conviction in the case styled *United States of America v. Kenneth Strain*, No. 92-8416. A copy of that

Opinion is attached hereto as Appendix A. A copy of the Judgment and Sentence of the District Court is attached hereto as Appendix B.

JURISDICTION

The judgment of the court below (Appendix A, *infra*) was entered on March 4, 1993. Petitioner timely filed a Petition for Rehearing. The court below entered an Order denying the Petition for Rehearing on March 31, 1993. A copy of the Order denying rehearing is attached hereto as Appendix C. This Petition is filed within ninety days of that date. The jurisdiction of this Court to review the judgment on Petition for Certiorari rests upon Sec. 1254(1) of the Judicial Code and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Sentencing Guidelines §1B1.3:

> "*Relevant Conduct (Factors that Determine the Guideline Range)*
>
> (a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

(4) any other information specified in the applicable guideline.

United States Sentencing Guidelines § 2D1.4:

Attempts and conspiracies

(a) If a defendant is convicted of a conspiracy or an attempt to commit any offence involving a controlled substance the offense

level shall be the same as if the object of the conspiracy or attempt had been completed.

STATEMENT OF THE CASE

A. *Course of Proceedings.*

Petitioner Kenneth Strain was charged by indictment with a violation of Title 21 U.S.C. §846, Conspiracy to Possess with Intent to Distribute Marijuana. On March 23, 1992, Petitioner pled guilty pursuant to Rule 11(e)(2) of the Federal Rules of Criminal Procedure conditioned upon his right to appeal the trial court's denial of his Motion to Suppress Evidence Seized as a Result of His Warrantless Arrest and Warrantless Search of His Vehicle. On July 30, 1992, Petitioner was sentenced to a term of sixty months in the U.S. Bureau of Prisons, five years supervised release, and a $10,000.00 fine. In determining Petitioner's base offense level, the trial court considered 300 lbs. of marijuana to be the appropriate relevant conduct attributable to Petitioner. The amount of marijuana that should have been used to calculate Petitioner's base offense level was 100 lbs. If the court had used 100 lbs. of marijuana as the relevant conduct attributable to Petitioner, the base offense level would have been twenty. Applying the trial court's other findings at sentencing to a level twenty results in a sentencing guideline range of thirty to thirty-seven months, well below the sixty months assessed by the court. On August 4, 1992, Petitioner timely gave Notice of Appeal and all other appellate prerequisites were met. After argument and submission, the United States Court of Appeals for the Fifth Circuit issued an Opinion on March 4, 1993, affirming Petitioner's conviction and sentence. *See* Appendix A. Petitioner timely filed a Petition for Rehearing which was denied on March 31, 1993.

STATEMENT OF FACTS

On August 8, 1992, Petitioner, David Hoot (Co-Defendant), and Officer Farriss (an undercover officer) met at a carwash in southeast Austin, Texas. At the carwash, Petitioner got into the undercover officer's vehicle and engaged in a conversation for the purchase of marijuana. Officer Farriss was equipped with a hidden microphone and the conversation was recorded. Petitioner and Officer Farriss discussed the number of pounds of marijuana that Petitioner wanted to purchase, including the following:

Farriss:	"...you said you wanted one hundred right?"
Strain:	"Yeah."
Farriss:	"But I got, you know, I got three sitting out there."
Strain:	"Yeah, well I'll take a hundred though...." (*See* page 1 of Petitioner's Sentencing Exhibit 1A attached hereto as Appendix D).

During the same meeting, Officer Farriss acknowledged that Petitioner only wanted to purchase 100 lbs. wherein he stated:

Farriss:	"Okay, where...do you want me to meet you somewhere, or what do you want to do? on that or..."

Strain: "That will be a good time, I need to go to Del Valle."

Farriss: "I've got about an hour and a half and I'm gonna be tied up the rest of the evening cause I got somebody else coming, I need to hook up with on that other two." (*See* Appendix D, pp. 1-2).

Later, Officer Farriss and David Hoot met in the parking lot of a restaurant located in Austin, Texas. While sitting in the vehicle, Officer Farriss and Hoot began discussing the price of the marijuana to be purchased. As reflected in the recorded conversation and in the officer's testimony at Petitioner's pretrial Motion to Suppress, the officer understood that Petitioner was expected to return with $70,000.00 for 100 lbs. of marijuana at the price of $700.00 per pound. During this discussion outside the presence of Petitioner, Officer Farriss asked Hoot when Petitioner would let Officer Farriss know whether or not he wanted to purchase the other 200 lbs. Hoot replied that he would get the other two if the purchase of 100 lbs. went smoothly.

At the sentencing hearing on July 30, 1992, Hoot testified that he never discussed the purchase of more than 100 lbs. with Petitioner and that he never intended to purchase the other 200 lbs. from the officer, but was only trying to get the officer to engage in the first transaction with the promise of an additional transaction.

After Officer Farriss and Hoot discussed purchasing the other 200 lbs. Petitioner was arrested and Hoot never conveyed Officer Farriss' offer to sell the other 200 lbs. to Petitioner. Neither Officer Farriss, David Hoot, or Joseph

Rambo (another Co-Defendant) ever spoke to Petitioner about an offer to sell the other 200 lbs. Petitioner never agreed to undertake the purchase of an additional 200 lbs. and from the beginning it is clear that he only wanted to purchase 100 lbs. of marijuana.

REASON FOR GRANTING THE PETITION

1. **The trial court was clearly erroneous in using 300 lbs. of marijuana as the relevant conduct in determining Petitioner's base offense level rather than the 100 lbs. of marijuana that Petitioner agreed to purchase.**

Sec. 2D1.4 of the United States Sentencing Guidelines states in pertinent part:

> "(a) Base Offense Level: If a defendant is convicted of a conspiracy... involving a controlled substance, the offense level shall be the same as if the object of the conspiracy...had been completed." The United States Sentencing Commission, Guidelines Manual, §2D1.4 (November 1991).

Application Note 1 to §2D1.4 further states:

> "...If the defendant is convicted of an offense involving negotiation to traffick in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. *However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the*

> *negotiated amount, the court shall exclude from the Guideline calculation the amount that it finds defendant did not intend to produce and was not reasonably capable of producing....*" (emphasis added) U.S.S.G. §2D1.4, comment. (n.1).

In this case, Petitioner did not intend to purchase 300 lbs. of marijuana, but only 100 lbs. The evidence also suggests that Petitioner only had sufficient funds to purchase 100 lbs. and was therefore incapable of purchasing 300 lbs.

Since §2D1.4 would not allow the trial court to determine a base offense level upon 300 lbs. of marijuana, then the trial court must decide whether the discussion about the purchase of 300 lbs. constitutes "relevant conduct" attributable to Petitioner.

Sec. 1B1.3, U.S.S.G., entitled "Relevant Conduct," states in pertinent part:

> "(a) Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level...shall be determined on the basis of the following:
>
> (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense or conviction, in preparation for that offense, or in the course of

> attempting to avoid detection or responsibility for the offense, or that otherwise were in furtherance of that offense."
>
> United States Sentencing Commission, Guidelines Manual, §1B1.3 (November 1991).

Application Note 1 to §1B1.3 defines conduct for which a defendant "would be otherwise accountable" to be:

> "...conduct of others in furtherance of the execution of the *jointly-undertaken criminal activity* that was reasonably foreseeable by the defendant."
>
> * * *
>
> "...where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with a criminal activity...such conduct is not included in establishing defendant's offense level under this Guideline." (emphasis added). U.S.S.G. §1B1.3, (n. 1).

The reasonable foreseeability requirement under §2D1.4 requires a finding separate from a finding that defendant was a conspirator. *United States v. Warters*, 885

F.2d 1266, 1273 (5th Cir. 1989). In other words, the trial court would "need to expressly determine not only the actual amount involved in the entire conspiracy...but also the amount...which the defendant knew or should have known or foreseen was involved." *Id.* at 1273.

More recently, in *United States v. Evbuomwan*, 992 F.2d 70 (5th Cir. 1993), the Fifth Circuit had occasion to closely scrutinize §1B1.3. In *Evbuomwan*, *supra*, the Fifth Circuit was faced with a situation where the trial court used $90,471 as the total loss attributable to defendant's credit card fraud of which defendant was only responsible for $1,500.00. Of the $90,471, at least $66,000 was attributable to losses arising from the "Bite Electronics" check fraud scheme perpetrated by Michael Aakhideno and Mark Dorenuma. The Fifth Circuit held:

> "Under Sec. 1B1.3, to hold Evbuomwan accountable for the losses arising out the Bite Electronics check fraud scheme, the Government must prove: (1) the Bite Electronics check fraud scheme was within the scope of Evbuomwan's agreement to jointly undertake criminal activities with Aakhideno and Dorenuma and (2) that the check fraud scheme was reasonably foreseeable to Evbuomwan." *Id.* at 72.

In reversing the trial court's decision to use $90,471 as relevant conduct, the Fifth Circuit held:

> "A finding that Evbuomwan agreed to jointly undertake criminal activities with Aakhideno and Dorenuma, and that the Bite Electronic scheme was within the scope of that agreement, is an absolute prerequisite to

> calculating Evbuomwan's base offense level on the basis of the loss arising from the Bite Electronic scheme. If Evbuomwan did not agree to jointly undertake criminal activities with Aakhideno and Dorenuma, or if the Bite Electronic check fraud scheme was not in the scope of Evbuomwan's agreement, the government and the lower court's findings that the check fraud scheme was reasonably foreseeable is simply irrelevant. The appropriate application of § 1B1.3 requires giving temporal primacy to the determination of whether defendant has agreed to jointly undertake a criminal activity. If the defendant has not joined the criminal activity, it does not matter that he could have foreseen the criminal act. The reasonably foreseeable standard applies only *after* it is shown that a jointly undertaken activity is taking place." *Id.* at 74. (emphasis in original).

Earlier, in *United States v. Rivera*, 898 F.2d 442 (5th Cir. 1990), the Fifth Circuit found that the offense level of a defendant who had been convicted of distributing heroin who was also indicted for conspiracy to distribute heroin should not have been calculated so as to include narcotic sales made by his co-defendants. The court found that the defendant had an agreement with the organizer of a drug ring to distribute heroin, but that there was not sufficient evidence of a "joint undertaking or plan" linking defendant to the heroin sales made by his co-defendants, although they were also supplied by the organizer and sold drugs from the same house as the defendant. *Id.* at 445-446.

The Eight Circuit in *United States v. North*, 900 F.2d 131 (8th Cir. 1990), was faced with a similar situation where

the defendant had purchased 5 oz. of methamphetamine from an individual named Murphy. Another 8 oz. had been seized from Murphy on the night of his arrest. North was convicted of various drug related offenses and of conspiring to possess methamphetamine. Based on "North's past dealings with Murphy," the district court found that North was accountable for the "reasonably foreseeable quantities in Murphy's possession, and 'calculated his base offense level using the total quantity of 13 oz.'" *Id.* at 133. The Eighth Circuit reversed, explaining that although "North admits that he knew that Murphy sold drugs to other persons..." *Id.* at 134, "simple knowledge that the supplier supplies other persons is not enough...to assess all quantities distributed by the supplier to each person to purchase drugs from that supplier." *Id.* The court found that North's conspiracy with Murphy had a "limited objective, specific to supplying drugs to each other," that Murphy had obtained the drugs seized from him "without the aid or assistance of Murphy," and that the "success of his attempts to peddle these drugs neither involved nor were necessary or advantageous to North." *Id.* at 133-34.

In the present case, Petitioner made it clear to Officer Farriss that he only intended to purchase 100 lbs. of marijuana and that he never agreed to jointly undertake any activity involving any additional amounts. David Curtis Hoot's testimony at sentencing clearly shows that his discussions with Officer Farriss for an additional 200 lbs. were not in furtherance of the execution of the jointly undertaken criminal activity with Petitioner. Petitioner had no knowledge of those conversations and had not agreed to join with David Curtis Hoot or anyone else for the purchase of more than 100 lbs. Therefore, it is not a question of whether an additional 200 lbs. was reasonably foreseeable to Petitioner, because he expressly stated that he did not want

more than 100 lbs. *and* did not join with anyone else to purchase more than 100 lbs.

CONCLUSION

The Fifth Circuit incorrectly found that there was evidence to support the District Court's determination in using 300 lbs. when calculating Petitioner's base offense level. The uncontroverted evidence in the record clearly shows that Petitioner intended to purchase only 100 lbs. of marijuana from the undercover officer and that he never agreed to jointly undertake in any activity for any additional amounts. Petitioner respectfully prays that this Honorable Court will grant this Application for Writ of Certiorari and that he will be given the opportunity to further brief and argue the issue raised herein.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

U.S. COURT OF APPEALS
F I L E D
MAR 04 1993
RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8416
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KENNETH STRAIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CT-117 (01))

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Kenneth Strain appeals his conviction and sentence for conspiracy to distribute marijuana, in violation of 21 U. S. C. §§ 841(a) (1) and 846. We AFFIRM.

I.

In July 1991, Stan Farriss, an undercover police officer, let it be known that he had a large quantity of marijuana to sell. Shortly thereafter, he was put in contact with David Hoot, who told Farriss that he had some people lined up to do business. Hoot then arranged a meeting, and introduced Farriss to appellant Strain. During the meeting, which was recorded, Farriss showed Strain a sample of the marijuana; and Strain agreed to purchase 100 pounds at $700 per pound. Strain then left, promising to have the money ready in one hour.

An hour later, Farriss and Hoot met Strain at the location Strain had designated. Hoot got into Strain's truck, and they drove away. When they returned approximately five minutes later, Hoot informed Farriss that Strain did not want to show Farriss the money for fear of being arrested. Hoot said, however, that Strain had the $70,000 in a shoebox on the floorboard of the truck, and that he, Hoot, had seen and counted it. Shortly thereafter, Farriss gave the arrest

---

1. Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

signal to nearby officers. When they approached Strain, he exited his truck and started walking away from it. The officers ordered him back to the truck, however, and arrested him. They then searched the truck, and found $70,000 in a shoebox on the floorboard and a cellular telephone.

Following his indictment in August 1991, Strain moved to suppress the evidence obtained as a result of the warrantless arrest and search of his truck. The district court held a hearing, and determined that the arrest and search were supported by probable cause. In March 1992, Strain pleaded guilty to the conspiracy charge, reserving his right to appeal the warrantless arrest and search. Strain was sentenced to 60 months imprisonment, followed by five years of supervised release and a $10,000 fine.

II.

Strain contends that the district court erred in (1) finding that his arrest was supported by probable cause and that the search of his vehicle was constitutional, and (2) calculating his sentencing guidelines base offense level.

A.

In reviewing challenges made to a ruling on a motion to suppress based on live testimony at a suppression hearing, factual findings must be accepted unless clearly erroneous or influenced by an incorrect view of the law. *United States v. Maldonado*, 735 F.2d 809, 814 (5th Cir. 1984).

1.

Probable cause to arrest is present when the facts and circumstances within the knowledge of the arresting officer and of which he has reasonable trustworthy information are

sufficient to warrant in a person of reasonable caution the belief that an offense has been, or is being, committed. *Maldonado*, 735 F.2d at 815. Probable cause to arrest is determined by looking at the totality of the circumstances surrounding the arrest. *United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir.), *cert. denied*, 474 U. S. 818 (1985).

Strain's contention that his arrest was not based on probable cause rests entirely upon Farriss's testimony at the suppression hearing that he did not believe Hoot, when Hoot stated that he had counted the money. Strain contends that, therefore, Farriss did not believe a crime was being committed. Farriss did testify, however, he believed Hoot's statement that he had seen the money. This fact, in addition to the fact that Strain had negotiated to purchase the marijuana, had left to get the money, had designated the meeting place at which to consummate the sale, had arrived there an hour later as promised, and had used Hoot to communicate with Farriss (their meeting was under audio surveillance) provided far more than enough support for the district court's finding that, under the totality of the circumstances, there was probable cause to arrest Strain.

2.

Strain next contends that his truck should not have been searched incident to his arrest because he was not occupying it at the time of the search, citing *New York v. Belton*, 453 U. S. 454, 460 (1981). The district court did not, however, uphold the search as one incident to arrest. Instead, it found that the search fell within the automobile exception to the warrant requirement. That exception is an independent one, based upon the risks posed by a vehicle's mobility and the lesser expectation of privacy one has in a

vehicle. *See United States v. Espinoza-Seanez*, 862 F.2d 526, 532 (5th Cir. 1988). Therefore, Strain's argument regarding search incident to arrest is irrelevant.

In any event, the district court did not err in finding that the search fell within the automobile exception and was supported by probable cause; based upon the events leading up to the agreed sale and Hoot's statement that Strain had the money in the truck, Farriss correctly adduced "a fair probability that contraband or evidence of a crime [would] be found" in it. *United States v. Delario*, 912 F.2d 766, 768 (5th Cir. 1990) (citations omitted).

Finally, Strain contends that the district court erred in using the 300 pounds of marijuana discussed during the conspiracy in calculating his base offense level, rather than the 100 pounds named in the count of conviction. The quantity of drugs used to calculate the base offense level is a factual finding reviewable only for clear error. *United States v. Devine*, 934 F.2d 1325, 1337 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 954 (1992). Strain was sentenced under, and we apply, the guidelines in existence before the November 1992 amendments took effect.

In the case of jointly undertaken criminal activity, the base offense level shall be determined based on all reasonably foreseeable conduct of others in furtherance of the jointly undertaken criminal activity. U.S.S.G. § 181.3, comment. (n.1). This includes quantities of drugs which the defendant could have reasonably foreseen would be involved in the conspiracy. *United States v. Puma*, 937 F.2d 151, 159-60 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1165 (1992). Furthermore, "[i]f the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount".

U.S.S.G. § 201.4, comment. (n.1); *see United States v. Sarasti*, 869 F.2d 805 (5th Cir. 1989); *United States v. Moore*, 927 F.2d 825, 827 (5th Cir.), *cert. denied*, 112 S. Ct. 205 (1991).

As in *Sarasti*, 869 F.2d at 807, the sentencing judge properly considered evidence that the amount mentioned in the indictment was part of a scheme that envisioned additional amounts. *See also Moore*, 927 F.2d at 827 (stating that court correctly considered drug amounts still under negotiation in an uncompleted distribution). Tho PSR whose findings the district court adopted, stated that Strain had spoken to both Hoot and Farris about buying an additional 200 pounds of marijuana following the initial 100 pound purchase. A PSR generally bears sufficient indicia of reliability to be considered as evidence by the trial court in making the factual determinations required by the guidelines. *United States v. Robins*, 978 F.2d 881, 889 (5th Cir. 1992). Furthermore, these findings were supported by other evidence introduced at the sentencing hearing, including a statement Hoot made during a recorded conversation on the day of the arranged sale. When Farriss asked him: "When's he [Strain] gonna let me know about the other two [hundred pounds]? Or does he don't [sic] wanna mess with the other two?", Hoot replied: "When this go smooth [sic], then we'll get the other two". The district court specifically determined that Strain "reasonably foresaw at least three hundred pounds of marijuana being dealt". Its findings were not clearly erroneous.

III.

For the foregoing reasons, the conviction and sentence are

AFFIRMED.

APPENDIX B

FILED
AUG 4 1992
U.S. DISTRICT COURT
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BY /s/ illegible DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA.
Plaintiff,

Case Number A-91-CR-117(1)

v.

USAO No. 9103869

KENNETH STRAIN,
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, KENNETH STRAIN, was represented by DICK DeGUERIN.

On motion of the United States, the Court has dismissed Count 2.

The defendant plead guilty to Court 1 of the indictment on March 23, 1992. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Dtls. & Section	*Nature of Offense*	*Date of Offense*	*Count Number(s)*
21:845	Conspiracy to distribute marijuana	08/08/91	1

As pronounced on July 30, 1992, the defendant is sentenced as provided in Pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00 for Count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 31st day of July, 1992.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Defendant's SSAN: 456-76-7339
Defendant's Date of Birth: 11/13/49
Defendant's address: 2500 Piping Rock Trail
Austin, TX 78748

Defendant: KENNETH STRAIN
Case Number: A-91-CR-117(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIXTY (60) MONTHS. DEFENDANT SHALL REMAIN ON PRESENT BOND PENDING APPEAL.

Return

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By_____
Deputy Marshal

Defendant: KENNETH STRAIN
Case Number: A-91-CR-117(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, State, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this Court (set forth below); and shall comply with the following additional conditions:

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

— If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not own or possess a firearm or destructive device.

X The defendant shall participate in a program approved by the U.S. Probation Office for

treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if he has reverted to the use of drugs or alcohol.

X The defendant shall permit access to all financial records and documents requested by the U.S. Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the Court or probation officer,

2) The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month,

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer,

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons,

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment,

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernells related to such substances,

8) The defendant shall not frequent places where controlled substance are illegally sold, used, distributed, or administered,

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer,

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer,

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer,

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristice, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: KENNETH STRAIN
Case Number: A-91-CR-117(1)

FINE

The defendant shall pay a fine of $10,000.00 This fine includes any costs of incarceration and supervision.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

The fine shall be paid as directed by the U.S. Probation Officer.

If the fine is not paid, the Court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: KENNETH STRAIN
Case Number: A-91-CR-117(1)

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report except a 2-level adjustment for acceptance of responsibility was granted.

Guideline Range Determined by the Court:

Total Offense Level:	24
Criminal History Category:	II
Imprisonment Range:	57 months to 71 months
Supervised Release Range:	3 to 5 years
Fine Range:	$10,000 to $1,000,000.00
Restitution:	$-0-

The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

APPENDIX C

U.S. COURT OF APPEALS
F I L E D
MAR 31 1993
RICHARD E. WINDHORST, JR.
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(stamp illegible)

No. 92-8416

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH STRAIN,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(March 31, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby

DENIED.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX D

STRAIN AND FARRIS IN THE PRESENCE OF CO-DEFENDANT HOOT

FARRIS: ***I'm forty years old; and I ain't ...

STRAIN: Shit, I'm older than you.

FARRIS: Are you really?

STRAIN: I'm forty-one.

FARRIS: You don't look it, but I guarantee you, I don't care if you're thirty, if you feel old.

STRAIN: What's these gonna go for?

FARRIS: That, uh six a hundred, six, six hundred pounds for a hundred pounds. That's what Dave and I talked about, we tried to do for one hundred twenty-five, you said you wanted one hundred right?

STRAIN: Yeah.

FARRIS: But I got, you know I got three sitting out there.

STRAIN: Yeah, well I'll take a hundred, though.

FARRIS: Okay. You got something to show me?

STRAIN: Uh, uh, not with me, I got ...

FARRIS: You don't have it with you?

STRAIN: I got it, what the green?

FARRIS: Yeah.

STRAIN: Oh yeah, I got it.

FARRIS: Soon as I can see that, I'll take him out there or bring it in, whatever y'all want to do.

STRAIN: Okay.

FARRIS: I'll bring you a hundred, like I said, he can go with me and look in each bale first if he wants to. I don't have any problem with that at all.

STRAIN: Well, uh, it will take me about an hour to go get it.

FARRIS: Okay, where...do you want me to meet you somewhere, or what do you want to do? on that or ...

STRAIN: That will be a good time, I need to go to Del Valle.

FARRIS: I've got about an hour and a half and I'm gonna be tied up the rest of the evening cause I got somebody else coming, I need to hook up with on that other two.

STRAIN: Okay, let's see, what time is it? 12:30?

FARRIS: 12:40 now yeah.